FEDERAL MENS REA INTERPRETATION AND THE LIMITS OF CULPABILITY'S RELEVANCE

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I
INTRODUCTION

The standard description of Anglo-American criminal law is that liability requires voluntary conduct and a culpable mental state—the union of act and intent.[1] Proof of both ensures that criminal punishment rests upon fault as well as wrongdoing, where wrongdoing refers to conduct that violates a prohibition, and fault is a determination based on intention or conscious awareness of the wrongful conduct, its consequences, and the significant circumstances in which it occurs.[2] Together wrongdoing and fault make an offender blameworthy (or culpable), which justifies imposing criminal sanctions. An important corollary is that criminal punishment is set in some *proportion* to wrongdoing and fault; culpability limits punishment.

Mens rea requirements are the traditional means to determine culpability. That is, we determine fault by proof of an actor's mental state—intention, knowledge, recklessness, or perhaps negligence—with regard to various elements of the offense. Thus, the difference in causing a death intentionally and causing a death non-negligently (holding aside defenses) is the difference between liability for murder and no liability. Similarly, after one's hand makes contact with another's nose, liability for assault may depend on whether one was aware that another was within range of voluntary arm movements. And liability for theft depends in part on one's awareness that the property belonged to another.

The story is more complicated, of course. There is a longstanding rationale for a broad range of "public welfare" offenses that require no fault—no proof of mens rea. Liability is justified largely on instrumental grounds—prevention of harm—and on proof (generally, in some sense) of a causal relationship

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1. Morissette v. United States, 342 U.S. 246, 251 (1952) (stating crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").

2. *See generally* John Gardner, *Wrongs and Faults*, *in* APPRAISING STRICT LIABILITY 51 (A.P. Simester ed., 2005).

between the actor and the risk that the offense targets.[3] As a category, those offenses generally have low (misdemeanor-level) punishments, and they are not my focus here.[4] The more challenging and significant complications regarding the fault requirements arise in serious offenses carrying significant prison terms. As a practical matter, these difficulties concern *which* elements of felony offenses carry mens rea requirements. For this question, the principle that "criminal liability requires proof of a culpable mental state" is insufficient. Strict liability as to some elements of offenses is widespread and often non-controversial. Yet courts lack reliable interpretive tools for distinguishing which statutory elements will carry strict liability, surely in part because legislatures do not seem to follow consistent principles when designating strict liability elements and employ drafting conventions that make their intentions on such choices unclear.[5]

Courts' interpretive choices regarding mens rea present a choice of two accounts of culpability, which are also bases for sentencing. These choices address ideas of what degree of culpability is required to justify criminal punishment, which is the same choice underlying legislatures' design of offense definitions. One account is *proportionate culpability*. This principle states that punishment must be *in accord with* or *in proportion to* culpability, and it is sometimes endorsed by courts[6] and overwhelmingly by scholars.[7] Mens rea must

3. *See, e.g.*, Staples v. United States, 511 U.S. 600, 607 n.3 (1994) (reiterating that public welfare statutes may dispense with a "mental element"); Liparota v. United States, 471 U.S. 419, 433 (1985) (stating that a public welfare offense is "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety"); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (reasoning that when dangerous products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware of possessing them is presumed to also be aware of the regulation).

4. Some of the classic literature includes GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART ch. 6 (2d ed. 1961); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 325–51 (2d ed. 1960); Richard Wasserstrom, *Strict Liability in Criminal Law*, 12 STAN. L. REV. 731 (1960) (offering justifications for some versions of strict felony liability). For an account of the tide turning against strict liability in the late 20th century, see Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989).

5. There is very little constitutional law restraint on legislatures' creation of strict criminal liability offenses, but, notwithstanding a couple of decisions implying the possibility of a constitutional requirement of mens rea, such as Lambert v. California, 355 U.S. 225 (1957). For an example of a statute held to violate due process for insufficient mental state requirements, see Illinois v. Madrigal, 948 N.E. 2d 591, 597–98 (Ill. 2011) and cases cited therein. For a leading account of the (minimal) constitutional law on strict liability, see Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 829 (1999).

6. *Morissette* is often considered a canonical case on this point, stating

> [t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. For a more recent, though implicit statement of the idea, see United States v. Flores-Figueroa, 129 S. Ct. 1886, 1890 (2009) (reasoning that not applying a statute's requirement of knowledge to all elements is inconsistent with the heavy penalty). State courts routinely require a mental element as well. *See, e.g.*, Illinois v. Valley Steel Prods. Co., 375 N.E. 2d 1297, 1305 (1978) (stating that "[i]t would be unthinkable to subject a person to a long term of imprisonment for an

attach to every normatively significant element of the offense as a means to measure culpability; one who intends a bad result demonstrates more fault than one who intends conduct but not the result it causes. The Model Penal Code (MPC), the American Law Institute's mid-century recommendation of how American criminal law should be designed, strongly endorsed proportionate culpability.[8] This idea, however, characterizes neither American criminal law nor courts' interpretation of mens rea requirements.

The contrasting principle one might call *threshold culpability* and seems to be the dominant view of American courts and legislatures. On this view, proof of mens rea is needed only to determine whether one is innocent or blameworthy for *some* offense. Culpability merely defines *eligibility* for punishment; it plays no necessary role in setting the magnitude of a sentence nor places an upper limit on punishment. Other considerations, such as deterrence goals, perform these functions. I argue that limiting mens rea to this threshold role explains how federal courts (like their state counterparts) routinely interpret statutes to impose strict liability on elements that are both central to a statute's definition of wrongdoing and the sole basis for authorizing significant sentence enhancements.[9] The implication for statutory interpretation is that mens rea need not attach to every element. Thus, culpability as to conduct can shift one's status from innocent to blameworthy, after which strict liability may apply to circumstances or results, even when large distinctions in liability and sentence may rest on their proof.[10]

This eligibility-defining function of mens rea coupled with denial of its

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offense he might commit unknowingly").

7. *See, e.g.*, JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 213–38 (2007); ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING 15, 29 (2005); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8–12 (2d ed. 2008); Gardner, *supra* note 2, at 51.

8. The MPC codified the commitment to the fault requirement in three related provisions designed expressly as canons of statutory construction. One dictates that courts should imply a mens rea of at least recklessness whenever a statute lacks a mental state requirement. MODEL PENAL CODE § 2.02(3) (1962). A second dictates a presumption that any mental state requirement in a statute applies to all elements of the offense (so that no part of the offense is a strict liability element). *Id.* § 2.02(4). The third defines a category of minor, non-criminal "violations" to which mens rea presumptions do not apply. *Id.* § 2.02(5). The MPC has inspired more than half of the states to adopt varying degrees of its reforms.

9. For an account of U.S. Supreme Court mens rea doctrine criticizing threshold culpability's inadequacy in assuring proportional liability, see Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 137–42 (2009).

10. This differs from the public welfare offense category, in which mens rea may not attach to *any* element of the offense. Strict felony liability usually requires some initial proof of an offender's mens rea for at least one element of an offense. Antony Duff describes this "substantive" strict liability:

> Liability is strict if it requires no proof of fault as to *an* aspect of the offence: while *mens rea* must be proved as to some elements . . ., it need not be proved as to every fact, consequence or circumstance . . . . Liability is substantively strict if it does not depend on proof of some appropriate moral culpability as to some aspect of the offence—proof of some fault that would justify condemning the defendant for committing the offence.

R.A. Duff, *Strict Liability, Legal Presumptions and the Presumption of Innocence*, *in* APPRAISING STRICT LIABILITY 125, 125–26 (A.P. Simester ed., 2005).

relevance to setting the quantum of punishment is pervasive in criminal statutory interpretation, although the proportionality principle continues to characterize some offense definitions and judicial decisions. Moreover, some strict liability decisions, which formally follow a threshold liability model, in fact require sufficient proof to infer some culpability even for the strict-liability element. Courts note this, suggesting the appeal of proportionate culpability or incomplete commitment to strict liability without any regard for culpability in explaining the full magnitude of liability and punishment.

This ambivalence about the role of culpability and its proof through mens rea requirements complicates courts' design and adherence to clear rules of statutory interpretation. In particular, rules that guide and simplify inquiries into statutes' meaning and legislative intent are problematic. Canons of construction that lead to strict liability readings often conflict with those that dictate an inference of mens rea to serve the value of proportionate liability (conflicting interpretive canons are a familiar problem[11]). It is hard to read contemporary decisions on mens rea and discover principled (or even consistent) grounds for choosing one sort of canon over another.

To develop these arguments, I focus on federal law, although the story is much the same in state jurisdictions, including even those in which legislatures have adopted MPC-inspired statutes favoring the presumption of mens rea. Recent federal court decisions show that judges routinely interpret statutes to impose severe sentence enhancements based solely on proof of a strict-liability element. These decisions represent examples of how culpability serves only to define eligibility for punishment rather than the magnitude of the sentence. Yet the U.S. Supreme Court recently used a different interpretive approach. It reaffirmed an approach to explicit mens rea requirements that uses fault as a proportionate limit on sentencing enhancements and that restates an interpretive rule favoring mens rea requirements for all significant offense elements.

II

The federal criminal code lacks any general principles regarding mens rea interpretation, but the Supreme Court has established several interpretive canons to guide inferences of mental state requirements. Public welfare offenses and regulatory crimes concerned with "dangerous devices" are marked as a special category for which no mens rea will be presumed.[12] Otherwise, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."[13] "[T]he failure of

11. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) (famously juxtaposing a series of seemingly conflicting canons of construction).

12. *See* Staples v. United States, 511 U.S. 600, 606–07 (1994); Morissette v. United States, 342 U.S. 246, 254 (1952).

13. United States v. U. S. Gypsum Co., 438 U.S. 422, 438 (1978).

Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law."[14] The distinctive nature of federal criminal law, in which offenses often include elements specifying the basis for federal jurisdiction, has led to a presumption of strict liability for jurisdictional elements. These elements rarely play a normative role in defining criminal wrongdoing.[15] And statutory crimes based in common-law offenses are presumed to carry common-law culpability requirements even when the statute includes no such term.[16]

The key components of the vast case law on statutory interpretation—and a large body of scholarly literature focused on it—are familiar.[17] A court's first step is to read the statute's text for a plain or ordinary meaning, which can be the best guide to legislative intent.[18] This may require resorting to dictionary definitions and—often in mens rea analysis—inferences of typical grammar or syntax usage, sometimes drawing from writing style manuals as guides on common usage—and therefore—textual meaning.[19] If the text's meaning is unambiguous, the question is settled. If not, courts resort to other strategies, including canons of construction, such as those just noted, and other evidence of statutory purpose and legislative intent.[20] They may also seek guidance from a predecessor statute[21] or from the title of the statute. Furthermore, under the doctrine of *in pari materia*,[22] the construction of related statutes or those employing similar language can guide courts. The priority and influence of these secondary tools vary according to the interpreter's methodology.

All these strategies are means of determining the legislature's intent for the statute. Yet it is easy to see how these different interpretive methods can and do

14. Liparota v. United States, 471 U.S. 419, 426 (1985).

15. *See, e.g.*, United States v. Yermian, 468 U.S. 63, 68–71 (1984); United States v. Feola, 420 U.S. 671, 676–77 (1975).

16. *Morissette*, 342 U.S. at 263 (discussing the presumption of mens rea for common-law offense analogues). Furthermore, the rule of lenity dictates narrow construction in the face of statutory ambiguity, supporting the notion that common-law offenses require mens rea.

17. For a brief overview, see FREDERICK SCHAUER, THINKING LIKE A LAWYER 148–70 (2009). For a thorough overview of the literature and an insightful account of the textualist-intentionalist distinction, see Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005).

18. *See, e.g.*, United States v. Fisher, 289 F.3d 1329, 1338 (11th Cir. 2002) ("The plain language of a statute is presumed to express congressional intent.").

19. Nelson, *supra* note 17, at 376 (noting "all mainstream interpreters" begin with these strategies); *see, e.g.*, Carter v. United States, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by analyzing the text."); United States v. Montejo, 442 F.3d 213, 215 (4th Cir. 2006).

20. Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 968–74 (2004); Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1619–23 (2000) (both noting assumptions about a writer–speaker's purpose or intent is critical to inferring meaning); Nelson, *supra* note 17, at 355 (noting that textualist judges use these strategies). Textualists in particular would likely look to the statute and surrounding statutes alone, rather than to other evidence of legislative intent. *Id.* at 355–60; SCHAUER, *supra* note 17, at 158–63.

21. *See, e.g.*, *Morissette*, 342 U.S. at 266 n.28.

22. Statutes "*in pari materia*"—dealing with the same subject matter—should be construed consistently.

lead to different results. Interpretation of a text built on assumptions about common syntax and grammar usage, and the meanings they ordinarily generate may yield an understanding different from one built on a normative presumption that mens rea terms apply to all non-jurisdictional elements. A statutory text's ordinary meaning does not always yield the mens rea requirement that we would infer from relying on a presumption for culpability requirements. That disconnect, in fact, turns out to be a notable occurrence in federal criminal law interpretation.[23] And it has led multiple federal courts to adopt interpretive strategies that minimize culpability requirements on the basis of plain or ordinary meaning.

Consider *United States v. Jones*.[24] The court's task was to interpret the Mann Act provision in 18 U.S.C. § 2423(a), which reads:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.[25]

The defendant argued the mental-state term "knowingly" required the government to prove not only that he knew he "transported an individual," but also that he knew she was under the age of eighteen.[26] The government argued the statute required no proof of knowledge regarding age. The age element is critical to the severe sentencing range of ten years to life; an adjacent code section criminalizes the same conduct but does not include an age element and sets ten years as the *maximum* sentence, with no mandatory minimum.[27] Thus, whether mens rea attaches to the element is a question of culpability's relation to the gravity of punishment. Requiring mens rea only for the conduct follows the principle of threshold culpability; once the defendant's conduct makes him culpable, the magnitude of his punishment can vary tremendously (decades in prison) with no relation to his degree of culpability. Extending mens rea to the age element, in contrast, links punishment proportionately to culpability.

The *Jones* court followed the federal courts' consistent pattern, holding that no mens rea requirement attached to the age element. The opinion relied on two reasons for the conclusion. First, it first focused on the statute's "grammatical structure" and asserted that a standard grammar rule is that "[a]dverbs generally modify verbs,"[28] a premise that became a significant interpretive canon in a series of cases. Given this view of the adverb's role in defining the sentence's meaning, the court concluded that "the adverb

23. *See* United States v. Meek, 366 F.3d 705, 718–19 (9th Cir. 2004) (opting for the presumption of scienter over the inference from the plain meaning).

24. 471 F.3d 535 (4th Cir. 2006).

25. 18 U.S.C. § 2423(a) (2006). The statute was amended after Jones's offense; the statute as it applied to him had a punishment range of five to thirty years. *Jones*, 471 F.3d at 538 & n.1.

26. *Jones*, 471 F.3d at 538.

27. 18 U.S.C. § 2421 (1998).

28. *Jones*, 471 F.3d at 539.

'knowingly' modifies the verb 'transports'" but nothing else in the sentence. Otherwise, "the thought that [adverbs] would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil."[29] The court found that "nothing on the face of this statute" suggested that Congress intended to require defendant's mens rea regarding the victim's age.[30]

Evidence of Congress's expressly instrumental purpose for the age element confirmed the grammar-based reading. The statute "provid[es] extra protection" to minor victims compared to adult victims, the court inferred, making it unlikely that "Congress intended to make the evidentiary burdens" of the crime harder for the prosecution to meet than for the lesser offense protecting adult victims.[31] Section 2423(a) "creates a more serious crime in order to provide heightened protection against sexual exploitation of minors;" a knowledge requirement would be "nonsensical" because it would "strip the statute of its clear purpose: the protection of minors."[32]

Every mens rea requirement makes offenses harder to prove; indeed, the point is to ensure only the culpable are criminally punished and—if punishment were calibrated to culpability—to ensure harsher punishment is based on greater culpability. But in this Mann Act offense, once initial culpability is demonstrated with proof of knowing transportation, culpability is normatively irrelevant to justifying additional punishment; only instrumental goals control, which is a view that contributes to the intuitive appeal of the grammar analysis.

Taken literally, *Jones* rejects the relevance of the blameworthiness of knowingly transporting *a minor* to take part in sex crimes. But this interpretation's intuitive appeal rests, without acknowledgement in *Jones*, on a recognition or presumption that most or nearly all offenders under § 2423(a) *are* in fact culpable. Mr. Jones himself was driving a thirteen-year-old for three days from one truck stop to another, where she engaged in commercial-sex transactions.[33] Proof of this conduct and of the minor's age makes Mr. Jones's knowledge of her age easy to infer. Not all Mann Act cases make the inference so easy. But the offense requires *knowing transport* of a person and *intent* for that person to engage in sex crimes. These elements also make it likely (though not certain) that the offender *saw* the victim, thus providing him some basis at least to suspect or guess her age, in the context of intentional conduct (sex crimes) that are especially harmful to minors. Even a legislature or court committed to requiring *culpability regarding the victim's age* might conclude that proof of the offense elements, even with strict liability as to age, raises

29. *Id.* at 539; *see also* United States v. Jennings, 496 F.3d. 344, 354 (4th Cir. 2007) (quoting this *Jones* passage and applying the same adverb analysis to hold that the statute's knowledge requirement in 18 U.S.C. § 2243(a) does not extend to the element defining a minor victim's age).

30. *Jones*, 471 F.3d at 539 (because "the adverb 'knowingly' obviously modifies the verb, 'transports,'" it "would be implausible to suggest that . . . [it] applies to both the noun and its dependent clause").

31. *Id.*

32. *Id.* at 540.

33. *Id.* at 537.

sufficient inferential proof (in most cases) of minimal culpability—recklessness or negligence—as to age. In other sex offenses with minor-age elements, such as statutory rape and sexual assault, it is virtually assured that the offender sees the victim.[34]

The plausibility of that inference depends in part on how reasonable it seems that some offenders are non-negligent—for example, because a seventeen-year-old appears older and has a false ID. Plus, the Mann Act's prohibited conduct, to *transport*, makes it possible that some offenders commit the act without ever seeing the victim—although, the act plausibly provides a reason to find negligence or recklessness given the nature of the intended sex-crime activity. But by assuming that a large portion of cases raises a culpability inference as to age, we can view the standard interpretation of the Mann Act that *Jones* represents as resting on an expectation (in most cases) of a rough proportionality between punishment and culpability, even without required proof of mens rea and despite the court's exclusively instrumental reasoning.

Yet courts' reasonings matter. Pressed by limited time, judges rely on the interpretive conventions and stated reasons of past decisions to provide quick and clear guidance.[35] Both of *Jones*'s rationales undermine a commitment to culpability. Instrumental goals of maximizing harm prevention by more easily imposing punishment simply reject the value of culpability. Grammar analysis built on the "adverb canon" has the consistent effect of limiting mens rea terms (usually expressed as adverbs) exclusively to conduct elements (verbs). If federal common law includes a canon like "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element"[36]—a canon that tracks the MPC's presumption that a mens rea term applies to all elements[37]—then *Jones*'s adverb canon directly contradicts it.

These two different interpretive approaches are evident in a series of federal court decisions interpreting the frequently prosecuted fraud offense defined in 18 U.S.C. § 1028A, which bars certain fraudulent uses of another's identification information. The statute reads: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in

34. Strict liability as to age is the general rule for these offenses also. *See* Richard Singer, *The Resurgence of Mens Rea: II—Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 469–70 (1987) (noting this and tracing strict liability regarding a minor's age to *Regina v. Prince* and examining its wide adoption by American courts even after the British Parliament rejected the *Prince* rule). Strict liability regarding a minor's age is common in non-sex-related offenses as well. The Fourth Circuit had previously held the age element in a drug statute to lack a mens rea requirement in a drug statute. *See* United States v. Cook, 76 F.3d 596, 602 (4th Cir. 1996).

35. There are also normative reasons to constrain judges with rules, interpretive and otherwise. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645, 679–94 (1991) (arguing that rules, even if over- or under-inclusive in some applications, are desirable means of constraining officials' power).

36. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1891 (2009).

37. MODEL PENAL CODE § 2.02(3) (1962).

addition to the punishment for such felony, be sentenced to a term of imprisonment of 2 years."[38]

Prosecutors frequently use this statute to charge undocumented-immigrant defendants who obtain fraudulent Social Security or Alien Registration cards and similar documents to obtain employment in the United States. Defendants usually admit that they knew their documents were fraudulent. (The fraud is often obvious; many offenders use their correct names and photos, but a fabricated ID number.)[39] But they frequently and plausibly assert that they did not *know* the identity number on the documents had been lawfully assigned to other people. The question of statutory meaning is the familiar one: does "knowingly" apply only to the verbs denoting conduct such as "uses," or does it apply also to "a means of identification" and most importantly to "identification *of another*"? The interpretive choices distinguish two offenses: one that punishes merely the knowing use of false documents by which one might unknowingly harm a victim (though often not),[40] and one that punishes only a form of deliberate identity theft.

The Fourth Circuit faced a typical case in *United States v. Montejo*.[41] The court accepted that Mr. Montejo did not know the false numbers on his Social Security and Alien Registration cards (which had his correct name and photo) belonged to other people. But it found the statute unambiguous[42] in not requiring proof that he knew the numbers were "means of identification *of another*." Grammar analysis, backed by Congress's instrumental purpose for the statute, provided the key:

> We begin with grammar. The word "knowingly" in this case is an adverb that modifies the verbs "transfers, possesses, [and] uses." . . . The direct object of these transitive verbs is "a means of identification," a nominal phrase that is further modified by the adjectival prepositional phrase "of another person." . . .
>
> We think that, as a matter of common usage, "knowingly" does not modify the entire lengthy predicate that follows it. Simply placing "knowingly" at the start of this long predicate does not transform it into a modifier of all the words that follow. Good usage requires that the limiting modifier, the adverb "knowingly," be as close as possible to the words which it modifies, here, "transfers, possesses, or uses."[43]

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38. 18 U.S.C. § 1028A(a)(1) (2004).

39. *But see* United States v. Hurtado, 508 F.3d 603, 604, 609 n.7 (11th Cir. 2007) (stating that the defendant used several documents with another's name and identity numbers), *abrogated by* Flores-Figueroa v. United States, 129 S. Ct. 1886, 1894 (2009). Yet when a defendant uses another's name and ID number, circumstantial evidence makes it easy to prove that he *knew* he was using the identity "of another." *Id.*

40. A range of injuries is possible, but some false document use may not result in negative effects, such as FICA reporting under another's number. And that the offender's income is reported to and taxed by the Social Security Administration does not necessarily cause injury to the person assigned to that number. The same is true with Alien Registration numbers, especially if, as in *Montejo*, the number's lawful assignee has subsequently obtained citizenship.

41. 442 F.3d 213 (4th Cir. 2006).

42. *Id.* at 217 (stating that "the statute is not ambiguous").

43. *Id.* at 215 (citation omitted). The startling point of this analysis, however, is the judges expected "good usage." *Id.* Instead, given the judges' familiarity with legislative drafting, one would expect the weary observation that a given statute is "not a model of meticulous drafting." *See, e.g.*,

The reading produced by that grammar analysis accords with the interpretation dictated by the statute's singular purpose of preventing injury: "legislative history shows that Congress was concerned with aggravated identity theft . . . [from] entirely innocent people."[44] Other appellate courts that also reached this holding employed the same grammar analysis and assumed that Congress's instrumental goals took priority over more specific proof of culpability.[45] For the Eleventh and Eighth Circuits, "[t]he fact that the word 'knowingly'—an adverb—is placed before the verbs 'transfers, possesses, or uses' indicates that 'knowingly' modifies those verbs, not the later language in the statute."[46]

In all these decisions, the interpretive tools undermine any commitment to requiring mens rea for every element of the offense and to distinguishing between more and less culpable offenders in the service of proportionate liability and punishment. The courts frequently build analysis on the premise (inferred to be Congress's premise) of threshold culpability—that mens rea has no role other than to separate innocent actors from knowing wrongdoers. Hence *Montejo* understood Supreme Court precedents to apply "knowingly" only to elements beyond the conduct verb when it was necessary to prevent the liability of an innocent actor, rather than to further distinguish between greater and lesser liability. Thus, "*Liparota*'s discussion of the scope of 'knowingly' should not be understood apart from the Court's primary stated concern: avoiding criminalization of otherwise non-culpable conduct."[47]

Without this firm premise of mens rea's limited role and of culpability's irrelevance to the severity (or proportionality) of punishment, it would be puzzling that courts find a grammar analysis dictated by this adverb canon such a compelling indication of plain meaning as to remove all ambiguity. For one, precisely this question of what elements of a criminal statute an explicit mental state term applies to is a longstanding and routine ambiguity in many offense definitions.[48] And a long line of federal court decisions interpret mens rea terms

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United States v. Chin, 981 F.2d 1275, 1279 (D.C. Cir. 1992) (describing 21 U.S.C. § 861(a)(2)).

44. *Montejo*, 442 F.3d at 217. *But see* Villanueva-Sotelo, 515 F.3d 1234, 1243–44 (D.C. Cir. 2008) (finding a contrary purpose in the legislation).

45. United States v. Mendoza-Gonzalez, 520 F.3d 912, 915–16 (8th Cir. 2008):

> It is preposterous to think the same Congress that so plainly and firmly intended to increase the penalty . . . would then so limit its imposition as to require the Government to prove that the defendant *knows* he wrongfully possesses the identity "of another person" . . . [because it] would place on the prosecution an often impossible burden.

(citations and internal quotation marks omitted).

46. United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (citing United States v. Jones, 471 F.3d 535, 539 (4th Cir. 2006), for the rule "[a]dverbs generally modify verbs"); Hurtado, 508 F.3d at 610 n.8 (stating that "the plain meaning of the knowledge requirement in § 1028A(a)(1) is unambiguous"); Mendoza-Gonzales, 520 F.3d at 915 (8th Cir. 2008) (adopting and quoting the grammar-based analyses in *Hurtado* and *Montejo* to reach the same holding on § 1028A(a)).

47. *Montejo*, 442 F.3d at 216 (referring to Liparota v. United States, 471 U.S. 419 (1985)); *see also Hurtado*, 508 F.3d at 610 (quoting and adopting this view).

48. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972) (describing "the ambiguity which frequently exists concerning what the words or phrases in question modify" and offering the example of

to apply to statutory elements beyond the conduct term they are placed next to in the sentence.[49]

Further, any plausible account of the ordinary meaning of a sentence like the one in § 1028A—*even* as interpreted in *Montejo*—understands "knowingly" to apply to more than the verb, despite denials to the contrary. In the sentence, "whoever knowingly uses a means of identification of another [is guilty]," *knowingly* surely applies to more than just the verb *uses*, simply because one must know *what* one is using. Some verbs produce meaningful sentences without direct objects; one can "knowingly walk" or "knowingly shout" because those verbs need no referent to produce a meaningful sentence. But to "knowingly engage" or to "knowingly transport" requires knowing *what* one engages in or transports.[50] Nonetheless, courts declare that "[t]he only reasonable reading of [18 U.S.C.] § 2421 is one under which the adverb 'knowingly' acts only on the verb 'transports' and not on the noun 'individual,'"[51] or that in a statute that punishes one who "knowingly engages in a sexual act" with a minor under sixteen, "[t]he efficacy of the adverb 'knowingly' extends no further than the verb 'engages.'"[52] Yet those courts presumably expect proof that the defendant knew that *what* he transported was a person, and knew the conduct he engaged in was sexual in nature.

Similarly, *every* court including *Montejo* implicitly applies "knowingly" in § 1028A beyond the verb, *at least* to "a means of identification."[53] The debate is not whether the adverb modifies more than the verb; it is whether it applies

statute with a mens rea term "knowingly"); *Liparota*, 471 U.S. at 424–25, 425 n.7 (1985) (citing LaFave & Scott and discussing the general problem of criminal statute ambiguity because "it is not at all clear how far down the sentence the word 'knowingly' is intended to travel" and recognizing that "knowingly" sometimes applies to several statutory elements).

49. Again, a canonical example is Morissette v. United States, 342 U.S. 246, 271 (1952) (applying "knowingly" to "property of the United States" as well as to verbs defining prohibited conduct); *see also* Arthur Andersen LLP v. United States, 544 U.S. 696, 704–05 (2005); United States v. X-Citement Video, Inc., 513 U.S. 64, 68–70 (1994).

50. Academic linguists—who courts call grammarians—make this point compellingly in an amicus brief:

> The suggestion that *knowingly* modifies only the verbs does not square with the facts of ordinary English usage. [C]onsider the real-life sentence[] [from a news report]: . . . "[b]eginning January 1, 2007, every Colorado employer will be required to affirm . . . that . . . it has not knowingly hired an unauthorized alien." . . . If it were correct to say that adverbs modify only verbs, th[is] sentence[] would be nonsensical. [It] would mean that Colorado employers must affirm that they have not knowingly hired (anyone).

Brief of Professors of Linguistics as Amici Curiae in Support of Neither Party at 4, Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009) (No. 08-108).

51. United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009); *see also Jones*, 471 F.3d at 539 (interpreting 18 U.S.C. §§ 2421, 2423 and concluding "[i]t would be implausible to suggest that 'knowingly' . . . is intended to modify the noun 'individual.'").

52. United States v. Jennings, 496 F.3d 344, 354 (4th Cir. 2007).

53. *See Flores-Figueroa*, 129 S. Ct. at 1890 (2009) ("It makes little sense to read the provision's language as heavily penalizing a person who 'transfers, possesses, or uses, without lawful authority' a *something*, but does not know, at the very least, that the 'something' (perhaps inside a box) is a 'means of identification.'"); *id.* at 1894 (Scalia, J., concurring) (making the same point and citing United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008)).

merely to "a means of identification" or to "a means of identification *of another*." Yet the commitment to interpreting a statute to require mens rea only for "knowingly using a means of identification" without lawful authority while applying strict liability to the result that the identity information belongs to another, leads courts to mis-describe their own reading of the language in an effort to strengthen its justification.

The disregard for mens rea's role in distinguishing between more and less culpable offenders has more significant implications under § 1028A than under the Mann Act's § 2423. Under the Mann Act, as suggested above, Congress could plausibly conclude some evidence of culpability *regarding age* will be demonstrated from the statute's other proof requirements *even without* attaching mens rea to the age element. (The exceptions—one can speculate how large this group is—are offenders who were reasonable in wrongly believing a victim was at least eighteen.) The same inference of culpability for the strict-liability element does not hold for Aggravated Identity Theft under § 1028A. Some offenders will knowingly use another's name and identity information; their knowing use of another's identity will be easy to prove.[54] Others will attach randomly fabricated identity numbers to their true names and photos; some of those fabricated numbers will be (unknown to the offender) assigned by law to other people. Without requiring mens rea to "means of identification *of another*," no other proof required for the offense will provide a basis to infer culpability on that point. More starkly than the Mann Act, strict liability here groups together two sets of offenders of notably different culpability—knowing thieves of others' identities and unknowing (though arguably negligent)[55] fabricators of identity numbers.

That distinction could be the reason why the U.S. Supreme Court has never taken up federal appellate courts' consensus that the Mann Act imposes strict liability, although the Court did recently reject (nine to zero) in *Flores-Figueroa v. United States*[56] the appellate courts' strict liability reading of § 1028A. Yet if that was a reason, the Court left it unstated. Instead, the Court in *Flores-Figueroa* explained its rationale largely through ordinary grammar and textual analysis. In Justice Breyer's opinion for the Court, the plain meaning of the statute required knowledge for all the critical elements:

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54. *See, e.g.*, United States v. Hurtado, 508 F.3d 603, 604, 609 n.7 (11th Cir. 2007) (Hurtado used the birth certificate, a social security card, driver's license (with Hurtado's photo), bank debit card, library card, and vehicle registration and insurance with the name, identity numbers, and other information of Marcos Colon).

55. The argument from negligence might go as follows: one billion numbers are possible for nine-digit Social Security numbers. Roughly 300 million are assigned now to living Americans. If we assume reasonable people know the deceaseds' numbers are not reassigned, the total assigned numbers rise to approximately 450 million. Randomly taking a number, then, risks about a forty-five percent chance that the number is assigned—a plausible basis for arguing one is negligent in doing so. (Thanks to my colleague Rich Hines for this point.) Accepting that argument, one still must conclude the culpability of such negligence does not meaningfully differ from the culpability of the knowing theft of another's identity number so that both acts receive the mandatory additional sentence of § 1028A.

56. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890 (2009).

> As a matter of ordinary English grammar, it seems natural to read the statute's word "knowingly" as applying to all the subsequently listed elements of the crime. . . . In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.[57]

The Court found these grammatical observations to hold more generally for judicial construction of criminal offenses: "The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[58]

If Breyer's claim is taken as a canon of construction,[59] it should work much like the MPC's provision that dictates a culpability term should apply to all material elements.[60] At least for statutes that contain the word "knowingly" and have a similar structure to § 1028A, mens rea disputes may be reduced. But unless the Supreme Court recognizes the canon's substantive implications for the role of mens rea, it seems unlikely that courts will give much weight to the canon's *effect*. Although unnoted in *Flores-Figueroa*, the effect is to reserve additional punishment only for knowing users of false documents who are also knowing thieves of others' identities, and lesser punishment for knowing users who unknowingly—and thus less culpably—used another's identity. In other words, it seems unlikely that a grammar-based canon will be taken to signal that mens rea interpretation in offense definitions should be informed partly by a commitment to link punishment *proportionately* to liability, even though that is its consequence.

Without judicial (or legislative) endorsement of that proportionate culpability and punishment, *Flores-Figueroa* likely will meet resistance. A large body of case law explicitly justifies strict liability interpretations by endorsing the contrasting idea that mens rea serves only to shield innocent actors from liability and not also to inform allocation of different magnitudes of punishment. As a rationale for mens rea interpretation, this latter position, "threshold culpability," is the dominant one and seems to hold wide intuitive appeal. That appeal is manifest in decisions endorsing strict-liability-based sentence enhancements, and it is implicit in the lack of ambiguity many judges find in the statutes they interpret to impose strict liability for aggravating circumstance or result elements. Perhaps the adverb canon was attractive

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57. *Id.* at 1890.

58. *Id.* at 1891.

59. Justices Scalia, Thomas, and Alito, at least, doubt that Justice Breyer's claim is descriptively accurate and expressly deny it has any normative validity as a canon of construction (that is, that "knowingly" normally *should* apply to all elements). They join the holding only on grounds that the statute's plain meaning is clear. *Id.* at 1894 (Scalia, J., concurring); *id.* at 1895 (Alito, J., concurring).

60. MODEL PENAL CODE § 2.02(4) (1962). This provision adds the limitation "unless a contrary purpose plainly appears." One would expect the interpretive rule of *Flores-Figueroa* to be similarly limited by distinctions in the structure and syntax of statutory language.

because it confirmed some judges' misunderstanding of how grammar affects ordinary meaning. However, with *Flores-Figueroa*'s rejection of it (for one type of statute), courts will no longer be misled. Furthermore, one might suspect that the adverb canon's attraction was partly the normative appeal of the outcomes it generated, which were fewer evidentiary barriers for punishments serving instrumental goals. Linking degrees of culpability to degrees of punishment creates just such a barrier. As it happened, another Supreme Court decision handed down a week before *Flores-Figueroa* reiterated the principle of threshold culpability.

III

In *United States v. Dean*,[61] the Court held that a firearm statute imposes a significant prison term solely upon proof of a strict-liability element. Mr. Dean, who had been convicted of conspiracy to commit bank robbery and of discharging a firearm during the robbery, argued that the firearm offense required proof that he *intentionally* discharged the weapon. There was no dispute that he fired the gun accidentally, hitting a wall of the bank. The statute reads:

> [A]ny person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . —
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[62]

Dean was sentenced to the mandatory minimum of ten years under the final clause for *accidentally* discharging the firearm, a term that ran consecutively to his sentence of eight-and-a-third years for the robbery.[63]

Chief Justice Roberts's opinion for the Court, like both lower courts in *Dean*, concluded that Congress intended the final clause to apply even to offenders who discharged guns accidentally. Part of the Court's rationale was textual: The passive voice syntax in the final clause implied absence of a mens rea requirement (though not in the preceding clause). And structuring the sentence into numbered clauses suggested Congress did not mean for the Court's implied intent requirement in the initial clause[64] to extend to the final clause. The "most natural reading" is that the initial "adverbial phrases . . .

61. 129 S. Ct. 1849 (2009).

62. 18. U.S.C. § 924(c)(1)(A) (2006).

63. United States v. Dean, 517 F.3d 1224, 1227 (11th Cir. 2008).

64. *Dean*, 129 S. Ct. at 1854 (citing United States v. Smith, 508 U.S. 228, 238 (1993), as holding the statute's phrases "during and in relation to" and "in furtherance of" imply an intent requirement because each phrase "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence") (internal quotation marks omitted).

modify [only] their respective nearby verbs."[65] Unlike in *Flores-Figueroa*, the *Dean* Court was explicit about the substantive implications of this textual reading. The sentencing policy resulting from its reading of the statute reflects a widely accepted norm of punishing unintended consequences more severely than (different) intentional conduct or consequences: "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts."[66] Thus, *Dean* makes a straightforward observation of the punishment tradition under strict-liability elements instantiating the threshold culpability principle.

From *Dean* and *Flores-Figueroa*, one can draw the following interpretive rules:

> [I]t seems natural to read . . . "knowingly" as applying to all the subsequently listed elements of the crime. . . . In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb . . . that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.[67]

"The most natural . . . [and] better reading of the statute is that the adverbial phrases in the opening . . . modify their respective nearby verbs, and that neither phrase extends to the sentencing factors."[68]

One view could be that courts now have another iteration of Llewellyn's dueling canons.[69] The first supports reading a culpability requirement throughout the statute and facilitates proof of mens rea as a basis for enhanced punishment. The other stands as authority for finding no legislative intent to do so.

Another view, of course, is that the statutes are distinguishable, and so are the Court's interpretive rules. One statute has the express term "knowingly," and the *Flores-Figueroa* canon taken literally applies only to statutes with that term; the other statute had an intent requirement inferred from the phrases "during and in relation to" and "in furtherance of."[70] Also, *Flores-Figueroa* addressed a statute with a straightforward sentence structure; *Dean*'s

65. *Id.* at 1854. Justice Breyer dissented from the holding and, one assumes, this generalization about adverbs' typical effects. A week later, he wrote something very close to the opposite in his *Flores-Figueroa* majority opinion. Chief Justice Roberts, despite authoring *Dean*'s majority opinion, joined Justice Breyer's *Flores-Figueroa* opinion and not Justice Scalia's *Flores-Figueroa* concurrence, 129 S. Ct. at 1894, which pointedly rejected Breyer's generalization about adverb effects.

66. *Id.* at 1855 (emphasis in original).

67. United States v. Flores-Figueroa, 129 S. Ct. 1886, 1890 (2009).

68. *Dean*, 129 S. Ct at 1854. *Dean* alone, in fact, nicely encapsulates opposing canons of mens rea interpretation. One the one hand, because "[s]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime," the Court "on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *Id.* at 1855 (internal quotation marks omitted). On the other hand, "[w]e start, as always, with the language of the statute" and "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Id.* at 1853 (internal quotation marks omitted).

69. *See* Llewellyn, *supra* note 11, at 395–96 (famously juxtaposing a series of seemingly conflicting canons of construction).

70. For a distinction between mens rea interpretation of explicit and implicit requirements, see, e.g., United States v. Holmes, 607 F.3d 332, 337 (3d Cir. 2010) (interpretations of statutes with "knowingly" term are "inapposite" to interpretation of an implicit mens rea requirement).

interpretation arose from a statute broken into distinct clauses defining sentencing factors and minimums.

Those with confidence in courts' fidelity to such canons and ability to recognize proper occasions for their application can be optimistic that—although lower courts divided sharply in reading both statutes—this new interpretive guidance should prevent future disagreements in analogous statutes. Even if that confidence is well founded, however, the statutes as now defined by the Court embody contrasting approaches to culpability and punishment. That distinction in outcomes—and arguably in underlying punishment principle—can mislead courts' decisions of when and how each interpretive rule applies.

Assume that each decision correctly inferred Congress's intent. The result is that Congress enacted statutes that dictate different relationships between culpability and sentencing. The firearm statute imposes more punishment on the already-guilty based on unintended consequences, and *Dean* reaffirms this threshold culpability idea. The identity-theft offense as interpreted in *Flores-Figueroa*, on the other hand, links increased punishment to proof of increased culpability, although the Court does not acknowledge this proportional-culpability outcome. Those conflicting views of whether culpability has a role in authorizing and justifying *additional* punishment for actors already culpable for initial wrongdoing make it more difficult for courts to consistently choose between and correctly apply the *Dean* and *Flores-Figueroa* canons. But misapplication is more likely to spring from courts overlooking the *Flores-Figueroa* presumption that "knowingly" applies to all elements in statutes of simple sentence structure, because judicial recognition of *Dean*'s outcome and the threshold-culpability principle is more explicitly articulated and endorsed.

Consider that strict liability readings are well established for offenses with language closely tracking § 1028A's simple sentence structure.[71] The Mann Act is one example: "A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution . . . shall be . . . imprisoned not less than 10 years or for life."[72]

The statute contains the word "knowingly," and *Flores-Figueroa* says "it seems natural to read . . . 'knowingly' as applying to all the subsequently listed elements of the crime" because ordinarily we "assume that an adverb . . . tells the listener how the subject performed the entire action, including the object as set forth in the sentence."[73] No sentence structure distinguishes the Mann Act from the identity-theft offense,[74] such as the *Dean* firearm statute's separately

71. *See, e.g.*, 18 U.S.C. § 2243(a) (2006) (criminalizing "knowingly engaging in a sexual act" with youth under the age of sixteen); United States v. Jennings, 496 F.3d. 344, 355 (4th Cir. 2007) (holding no mens rea applies to § 2243(a)'s age element).

72. 18 U.S.C. § 2423(a) (2006).

73. United States v. Flores-Figueroa, 129 S. Ct. 1886, 1890 (2009).

74. 18 U.S.C. § 1028A(a)(1) (2006) ("Whoever, during and in relation to any felony violation

numbered clauses. Yet courts, taking *Flores-Figueroa*'s signal that "special context" might justify a different reading of a similar statute, have held that *Flores-Figueroa*'s interpretation does not change the established strict-liability reading of the Mann Act.[75]

Courts have so far made no effort to explain what that "special context" might be. But recall the earlier suggestion of a distinction between the Mann Act and Aggravated Identity Theft: Culpability as to the strict-liability element in the Mann Act will often be apparent through proving the statute's requirements; most offenders are similarly situated, with practical notice of the victim's age.[76] That is not true for many offenders under the identity-theft statute. Two very different types of actors would face the same enhanced punishment if the Court had not rejected the strict liability interpretation "identification of another": deliberate identity thieves who knowingly used another's identity, and knowing users of false but randomly-generated identity numbers that might belong to no one.[77] The implication is that proportionate culpability *does* matter, despite courts' frequent statements to the contrary. The "special context" that makes strict liability normatively acceptable is the type that characterizes the Mann Act offenses—offenders whose culpability regarding the strict liability element is typically apparent even without a mens rea requirement, thereby justifying the enhanced punishment triggered by that element.

Two other examples suggest the same implicit rationale. The first is *Dean*. In

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enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment for such felony, be sentenced to a term of imprisonment of 2 years.").

75. *See* United States v. Cox, 577 F.3d 833, 838 (7th Cir. 2009) ("*Flores–Figueroa* does not compel a[] [different] interpretation of § 2423(a) . . . . The *Flores–Figueroa* Court made clear . . . that 'the inquiry into a sentence's meaning is a contextual one,' and that a 'special context' might call for a different statutory interpretation.") (citing *Flores-Figueroa*, 129 S. Ct. at 1891); United States v. Daniels, 653 F.3d 399 (6th Cir. 2011) (presenting the same holding and rationale as in *Cox*); United States v. Murray, 663 F. Supp. 2d 709, 713 (W.D. Wis. 2009) (rejecting defendant's argument that 18 U.S.C. § 922(g) requires proof that he knew it was unlawful to possess a firearm because "how far the adverb 'knowingly' reaches into the elements of an offense depends on the circumstances").

76. United State v. Jones, 471 F.3d 535, 541 (4th Cir. 2006) ("Because an individual 'is already on notice that he is committing a crime when he transports an individual of any age in interstate commerce for the purpose of prostitution,' . . . it is both reasonable and just to conclude that 'the transporter assumes the risk that the victim is a minor.'") (citation omitted).

As an inference about all offenders under a particular statute, this conclusion may be weaker in the Mann Act than other offenses concerned with minors and sexual conduct because the Mann Act's age limit of eighteen includes older teenagers and the core conduct is "transporting" rather than direct sexual contact. The inference is surely strong in statutes such as 18 U.S.C. § 2243(a), which prohibits "knowingly engaging in a sexual act" with youth who are under sixteen. *See, e.g.*, United States v. Jennings, 496 F.3d. 344, 354 (4th Cir. 2007) (holding no mens rea applies to the age element).

77. *See Flores-Figueroa*, 129 S. Ct. at 1896 (Alito, J., concurring) (reasoning that without extending the knowledge requirement, "if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) *depends on chance*") (emphasis added). Thus, to avoid enhanced punishment based on chance rather than a culpable mental state, *even for offenders already culpable for using false identification*, Congress must have intended a mens rea requirement.

addition to citing the statute's ordinary meaning and its seeming endorsement of threshold culpability (via its observation that sentences routinely increase based on unintended consequences), Roberts's opinion argued that strict liability for discharging a gun was normatively appropriate (and therefore more likely to be the intent of Congress) because the statute's violation yields evidence of blameworthiness even without the mens rea requirement. Roberts emphasized the apparent fault of even the accidental gun discharge. Proof of mens rea is not the only way for a court to find blameworthiness. For the conduct this statute governs, "the actual discharge of a gun"—even when unintended—"does not mean that the defendant is *blameless*. The sentencing enhancement in subsection (iii) accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is *responsible*."[78] One who "brings a loaded weapon to commit a crime *runs the risk* that the gun will discharge accidentally."[79] Anyone who violates the statute, in other words, is in all likelihood *reckless*,[80] which is the same assumption Congress might make (perhaps less convincingly) about those who knowingly transport a youth under eighteen years old for criminalized sexual conduct. The elements of this firearm offense—culpable commission of a predicate crime and knowing possession of a gun—make the gun's *discharge* inevitably culpable (reckless), even if accidental.

The second example that strict liability tends to apply only when proof of mens rea is unnecessary to reveal culpability is the large and well-established case law holding that jurisdictional elements in federal crimes require no mens rea. Jurisdictional elements are often not normatively significant and so do little to distinguish levels of culpability. For example, one demonstrates fault by knowingly making false statements to another, but one is not necessarily *more* at fault when making them to a federal agent or agency.[81] One demonstrates fault in assaulting another, but not notably more fault by knowing the victim is a federal employee.[82] One can be culpable transporting firearms in some circumstances, but not more culpable for knowing the firearms crossed state lines.[83] And so on.

Together, these interpretations of statutes suggest some commitment to the idea that culpability should play a role in justifying degrees of and eligibility for punishment. Strict-liability elements appear only when proof of mens rea is not

78. United States v. Dean, 129 S. Ct. 1849, 1855 (2009) (emphasis added).

79. *Id.* at 1855–56 (emphasis added).

80. More precisely, it is possible, if unlikely, that one might be merely *negligent*. That would require a robber who possessed a loaded gun during a robbery but did not recognize (and then disregard) the risk of discharge that reasonable people would recognize in that setting.

81. United States v. Yermian, 468 U.S. 63, 69–70 (1984). Concededly, some false statements—such as those to friends about having "other plans"—are worse than others. But as in *Yermian*, statements about a significant matter—one's criminal history in a job application requiring security clearance—is not notably worse for being made to a federal agency than merely to a corporate employer.

82. United States v. Feola, 420 U.S. 671, 684 (1975).

83. United States v. Dancy, 861 F.2d 77, 81–82 (5th Cir. 1988) (no mens rea in firearm offense 18 U.S.C. § 922(g) for the element "in interstate or foreign commerce").

needed to calibrate culpability because either the element does not matter or the evidence of culpability (for the strict-liability element) comes from proof of other elements. One problem with this suggestion is that it does not track courts' stated rationales; it is hard to have confidence in a principle that courts not only do not mention but often deny. *Dean* rejected the defendant's argument that the firearm statute ratcheted up sentences stepwise with consistent culpability requirements tied to various conduct: *intentional* possession (five years), then *intentional* brandishing (seven), then *intentional* discharge (ten). The Court saw no reason to be confident that Congress connected sentence severity so closely to mens rea requirements. That is hardly a heartening commitment to proportionate culpability as a punishment principle.

Another problem with this suggestion is that it may not be reliably served by the interpretive canons. Some canons work well: The rule against implying mens rea for jurisdictional elements fits this account, as does the *Flores-Figueroa* canon that "knowingly" ordinarily applies to all elements. Its "special context" exception *could* serve the goal of proportionate culpability, if courts specify and limit its application along these lines.[84] But it is not clear that *Dean*'s interpretive model, which rejects mens rea for a statute's enumerated clauses, will lead to proportionate-culpability readings of other, similarly drafted statutes. For that to be so, the legislature would have to reserve such drafting for elements with no normative import or—as in *Dean*—elements for which the proof will typically make culpability evident even without a mens rea requirement. It seems clear that Congress does not do that. One statutory example among many is 21 U.S.C. § 841, a frequently enforced felony drug offense that specifies sentencing ranges depending on the quantity and type of drug involved. Courts uniformly interpret those drug-quantity clauses to lack mens rea requirements,[85] and in many cases proof of the other elements allows no easy inference that defendants likely knew, or were reckless as to, the drug's weight or quantity. And though § 841(a)(1) limits liability to offenders who "knowingly or intentionally . . . distribute . . . a controlled substance," its adjacent penalty-enhancement sections do not. Two provisions authorize a doubling of a § 841 sentence upon proof of an additional fact: if the offender "violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age"[86] or by doing so "within one thousand

84. Thus far, United States v. Cox, 577 F.3d 833 (7th Cir. 2009), best explains why the Mann Act provision of 18 U.S.C. § 2423(a), a statute similar in structure to § 1028A, is distinguishable by context. The explanation is notably thin. It recognizes that Section 2423(a) has long been interpreted to contain no mens rea for the minor-age element and notes that the element is not essential to distinguishing culpable from innocent conduct—although that is true for § 1028A as well. *Id.* at 837–38.

85. *See, e.g.*, United States v. Gonzalez-Rodriguez, 621 F.3d 354, 362 (5th Cir. 2010); *see also* United States v. Frazier, 213 F.3d 409, 418–19 (7th Cir. 2000) (holding that 21 U.S.C. § 861(a), which makes it an offense to use a minor in a drug operation, does not require knowledge of the minor's age); United States v. Jennings, 496 F.3d. 344, 354–55 (4th Cir. 2007) (holding that U.S.C. §2243(a)'s knowledge requirement does not extend to the element defining a minor victim's age).

86. 21 U.S.C. § 859(a) (2006).

feet of . . . public or private elementary, vocational, or secondary school."[87] Neither section repeats § 841's "knowingly" requirement,[88] and both are consistently interpreted not to require proof of mens rea for the element that triggers aggravation of the sentence—the minor's age or proximity to the school.[89]

One might posit the same story about drug sales to minors for the Mann Act: offenses that nearly always require face-to-face dealings with a minor will yield proof of negligence or recklessness as to age even without a requirement of proof. But that is a much less plausible assumption regarding proximity to schools, especially in "urban areas where schools are not clearly visible from points within the 1,000-foot zone or are not readily identifiable."[90] In these cases, courts explain strict liability without the suggestion present in *Dean* of evident recklessness regarding the strict-liability element.

Usually, the rationale for strict liability is, as with other statutes, purely instrumental: the statute aims not to enhance punishment based on greater culpability but in order to increase deterrence. To that end, offenders "bear the burden of ascertaining where schools are located and removing their operations from those areas."[91] With the school-zone drug offense as with other statutes, courts have reasonable evidence that legislatures in fact drafted an offense with prevention goals in mind that supersede any commitment to punishment in proportion to culpability.[92] Unless courts have wildly misread congressional intent—unless Congress in fact wanted mens rea requirements implied into grading and penalty enhancement statutes that lack such terms, despite its long acquiescence to strict-liability interpretations—the evidence is clear that legislators often intend culpability to serve only the threshold function of triggering punishment eligibility. Sentences can then be adjusted with regard to result and circumstance elements unconnected to an actor's culpability.

The evidence for this limited consideration of culpability goes, in fact, much deeper than statutes with strict-liability sentencing provisions, such as those we find in drug offenses. Adjusting punishment based on either unintended (or

87. *Id.* § 860(a).

88. A third section doubles the sentence for those who "knowingly and intentionally employ, hire [or] use . . . a person under eighteen years of age" in a drug operation. 21 U.S.C. § 861(a) (2006). Courts require knowledge that "employs, hires or uses" another but not that the person employed is under eighteen. United States v. Frazier, 213 F.3d 409, 418–19 (7th Cir. 2000) (holding that proof of defendant's knowledge of employee's age is not required); *see also* United States v. Cook, 76 F.3d 596, 600–01 (4th Cir. 1996); United States v. Chin, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

89. *See, e.g.*, United States v. Jackson, 443 F.3d 293, 299 (3d Cir. 2006) (no knowledge of proximity to school required); United States v. Falu, 776 F.2d 46, 49–50 (2d Cir. 1985) (same).

90. *Falu*, 776 F.2d at 49.

91. *Id.* at 50; *see also* United States v. Nieves, 608 F. Supp. 1147, 1149–50 (S.D.N.Y. 1985) ("It is difficult to imagine a more rational way of keeping drug traffickers out of areas where children are more likely to come into contact with them than to subject them to a risk of stiffer penalties for doing business near school property.").

92. *Falu*, 776 F.2d at 49–50 (citing legislative history and other arguments suggesting Congress's predominant goal was to prevent the school-zone offense).

unforeseen) resulting consequences or circumstances unknown to the offenders is a standard feature of sentencing policy, independent of the punishment components built in to offense definitions.[93] More significantly, punishment without a proportional connection to culpability has deep roots in the criminal law tradition; it characterizes definition of core criminal offenses. Many familiar crimes are defined and distinguished from lesser offenses solely by results that defendants did not intend or foresee. Defendants who do identical conduct with identical intent and identical knowledge of surrounding circumstances and risks can commit different offenses carrying very different penalties. Core examples include homicide, assault, and criminal attempt offenses. These offenses impose different degrees of liability on offenders whose conduct, intentions, and awareness are the same, depending on whether their identical actions caused a death, merely injured, or caused no injury at all.[94] Theft offenses also commonly adjust sentences according to the value of property taken, rather than the value offenders intended to take or believed they took.[95] The car driver whose drunken or otherwise negligent driving happens, by good fortune, to cause no injury faces less liability than an identically situated driver whose identical negligent conduct results in a fatality. This is, of course, a well-known puzzle, "a deep, unresolved issue in the criminal liability,"[96] at least if one is strongly committed to treating like cases alike based on individual culpability. It is part of the large literature on "moral luck," which addresses the challenge of explaining why we hold actors responsible based on outcomes partly beyond their control.[97]

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93. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(3) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/2008_manual.cfm (increasing offense level for aggravated assault according to the seriousness of the injury); *id.* § 2D2.3 (increasing offense level for operating or directing the operation of a common carrier under the influence of alcohol or drugs if death or serious bodily injury results); *see also* United States v. Dean, 129 S. Ct. 1849, 1855 (2009) (citing the U.S. Sentencing Guidelines).

94. The lack of any relation between culpability and punishment based on results is built in to several traditional criminal law statutes and doctrines, including lesser punishments for attempts than completed offenses and the availability of the impossibility defense (now rejected in many jurisdictions). *See* Sanford H. Kadish, *Supreme Court Review, Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 680–84 (1994).

95. Theft offenses, at least, probably share the rationale that the *Dean* opinion identified for the weapon-discharge offense: negligence or recklessness as to property value may fairly be imputed to most offenders as a justification for the greater penalty. The story is more complicated for homicide-assault-harmless-attempt distinctions, for which the state of mind regarding the specific risk is the same for offenders in each instance. Furthermore, separate from the definition of the offense, sentencing policies adjust punishments according to actual magnitudes of harm without regard to offenders' awareness or intent. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(3) (2008) (increasing offense level for aggravated assault according to the seriousness of the injury); *id*. § 2D2.3 (increasing offense level for operating or directing the operation of a common carrier under the influence of alcohol or drugs if death or serious bodily injury results); *see also* Dean, 129 S. Ct. at 1855.

96. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 473–74 (1978).

97. *See, e.g.*, BERNARD WILLIAMS, MORAL LUCK (1981); Dana K. Nelkin, *Moral Luck*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), *available at* http://plato.stanford.edu/archives/fall2008/entries/moral-luck/ ("Moral luck occurs when an agent can be correctly treated as an object of moral judgment despite the fact that a significant aspect of what she

Montejo's construction of the identity-theft statute notwithstanding, all of this suggests that courts are often correct to infer that legislators are not committed to a principle of proportionate culpability. They often do not intend punishment to be proportionately connected to culpability, which means they do not intend mens rea terms to attach to facts that adjust sentences even when these facts can impact sentences quite dramatically. Criminal law's central commitment—evident in its core offenses and doctrines and in courts' routine construction of every felony crime definition—is only proof of threshold culpability. Proof of fault shifts one from the status of innocent individual, who is protected from official punishment, to the status of culpable wrongdoer, on whom a wide range of punishments can be imposed for a wide range of reasons bearing no relation to the wrongdoer's fault other than some causal link.

Proportionate culpability retains sufficient normative appeal to characterize some offense definitions and their attendant allocations of punishment. *Flores-Figueroa* is one example. Justice Alito explained the need for proof of knowledge for the statute's elements so that imposing additional prison time (for offenders already culpable for using false IDs) would not "depend[] on chance."[98] Chance refers to the probability that "a made-up Social Security number" in fact belonged to another although the offender was "without having any reason to know" that.[99] Perhaps Justice Roberts's account of recklessness for weapon discharges in *Dean* is some indication of its appeal as well. But too many offenses and penalty-enhancement statutes reject any role for culpability in apportioning sentences to support a conclusion that mens rea consistently does anything more than define eligibility for punishment.

Felony strict liability will endure as long as that is true. Taking that as a given, the remaining concern is whether the interpretive rules will serve courts well in their construction of criminal statutes. Courts show institutional inclination to devise canons that strengthen the presumption of mens rea to a degree that they would force Congress to be exceedingly clear about its intent to create a strict-liability element. Yet existing canons do not do so. Canons are instead designed simply to yield interpretations that fulfill legislative intent regarding mens rea and culpability, which is no easy goal given the

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is assessed for depends on factors beyond her control. . . . The problem of moral luck arises because we seem to be committed to the general principle that we are morally assessable only to the extent that what we are assessed for depends on factors under our control . . . At the same time, when it comes to countless particular cases, we morally assess agents for things that depend on factors that are not in their control. . . . [I]f we accept the Control Principle in unqualified form, and deny the existence of moral circumstantial, character, and causal luck, then it seems that no actual punishment could be justified on the basis of moral desert.").
(citations omitted).

98. United States v. Flores-Figueroa, 129 S. Ct. 1886, 1896 (2009) (Alito, J., concurring).

99. *Id.* Under a strict liability interpretation, "if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) *depends on chance*." *Id.* To avoid enhanced punishment based on chance rather than a culpable mental state, *even for offenders already culpable for using false identification*, Congress must have intended a mens rea requirement.

congressional track record of employing a range of statutory drafting conventions. Perhaps *Flores-Figueroa* will reduce courts' susceptibility to ill-conceived grammar assumptions and bring some clarity at least to the construction of statutes comparable in their language to § 1028A. But by so far not applying the *Flores-Figueroa* presumption to the Mann Act, courts' decisions might be evidence of the challenge of even this aspiration. Canons, and their exceptions, must be interpreted as well. To do so, courts refer to criminal law's underlying values and traditions. The tradition courts routinely cite for mens rea questions (though not by this label) is threshold culpability—that mens rea's task is only to distinguish the innocent from the culpable.[100] The utility of interpretive canons is reduced to the degree courts need to invoke that tradition to inform their application of canons. Although the mens rea tradition of threshold culpability is criminal law's dominant account of the role of mens rea, it is not, as *Flores-Figueroa* demonstrates, the exclusive one.

100. United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) ("[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."); United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009) ("[S]ince age in § 2423(a) is not a factor that distinguishes criminal behavior from innocent conduct . . ., § 2423(a) is best read as" lacking a mens rea requirement for the age element that triggers a greater penalty); United States v. Jones, 471 F.3d 535, 541 (4th Cir. 2006) ("[T]he minority of the victim is hardly a factor that distinguishes the defendant's actions from 'innocent conduct.'").